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IN THE

Supreme Court of the United States

October Term, 1972.

No. 72-1688

IN THE MATTER OF
TIME SALES FINANCE CORPORATION.

BLANK, ROME, KLAUS & COMISKY,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

MARVIN COMISKY,
MORTON NEWMAN,
ALAN C. GRUBB,
Attorneys for Petitioner.

Of Counsel:
BLANK, ROME, KLAUS & COMISKY,
Four Penn Center Plaza,
Philadelphia, Pa. 19103

International Printing Co., 112 So. 16th St., Phila., Pa. 19102—Tel. LO 3-2289

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72- .

IN THE MATTER OF
TIME SALES FINANCE CORPORATION

BLANK, ROME, KLAUS & COMISKY,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

The petitioner, Blank, Rome, Klaus & Comisky, prays that a writ of certiorari issue to review the judgment entered in this matter on April 26, 1973, by the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW.

The opinion of Emil F. Goldhaber, Referee in Bankruptcy is printed in Appendix A to this petition. The opinion of the United States District Court for the Eastern District of Pennsylvania is printed in Appendix B to this petition. The judgment order dated April 26, 1973 and the order denying appellant's petition for rehearing dated May 16, 1973, both of the United States Court of Appeals for the Third Circuit are printed in Appendix C to this petition. None of the said opinions below have been reported.

JURISDICTION.

The judgment of the Court of Appeals for the Third Circuit was entered on April 26, 1973. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Is an attorney deprived of property without due process of law in contravention of the Fifth Amendment of the United States Constitution when he is denied any fee for representing a Debtor in bankruptcy proceedings for the sole reason that he defended the uncontraverted right of the Debtor's President to plead his constitutional privilege against self-incrimination?

2. Are the Fifth and Sixth Amendments to the United States Constitution, guaranteeing the rights not to incriminate oneself and to legal counsel violated or unconstitutionally "chilled" when Debtor's attorney in a proceeding under Chapter XI of the Bankruptcy Act is denied compensation for the sole reason that he defended the uncontraverted right of the Debtor's President to plead his constitutional privilege against self-incrimination?

3. Does Chapter XI of the Bankruptcy Act require that the Plan of Arrangement be confirmed for Debtor's attorney to be compensated for services rendered in aid of the administration of the debtor's estate?

STATUTES INVOLVED.

1. The Fifth Amendment to the Constitution of the United States provides as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising

in the land or naval forces, or in the Militia when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use, without justification."

2. The Sixth Amendment to the Constitution of the United States provides as follows:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

3. Section 337(2) of the Bankruptcy Act, 11 U. S. C. §737(2) as amended in 1967 provides in pertinent part as follows:

"At such meeting, or at any adjournment thereof, the judge or referee shall, after the acceptance of the arrangement—(2) fix a time within which the debtor shall deposit, in such place as shall be designated by and subject to the order of the court, the consideration, if any, to be distributed to the creditors, the money necessary to pay all debts which have priority, unless such priority creditors shall have waived their claims on such deposit, or consented in writing to any provision of the arrangement for otherwise dealing with such claims, and the money necessary to pay the costs and expenses of the proceeding; and . . ."

STATEMENT OF CASE.

On April 5, 1968, the law firm of Blank, Rudenko, Klaus & Rome (now Blank, Rome, Klaus & Comisky, hereinafter "Petitioner"), representing Time Sales Finance Corporation (hereinafter "debtor"), filed, on behalf of debtor, a petition for arrangement under Chapter XI of the Bankruptcy Act. Subsequent to that filing, Petitioner filed debtor's schedules, statement of affairs and a plan of arrangement. Petitioner's activities were also instrumental in getting the requisite majority of creditors to accept the plan of arrangement.

At the first meeting of the creditors, the debtor's president declined to answer questions put to him by counsel for the receiver on the grounds that to do so might tend to incriminate himself. Morton Newman, Esquire, a partner of Petitioner, pointed out orally to the Referee that there was sound precedent behind the debtor's president asserting his privilege against self-incrimination. The Referee sustained the witness' right to decline to answer. However, the Referee refused to confirm the plan on the grounds that the debtor's president's refusal to answer these questions left the Referee with insufficient information on which to base a confirmation. No appeal was taken from this order. Debtor was subsequently adjudged bankrupt.

Petitioner requested a $10,000 counsel fee for services rendered while representing the debtor in the arrangement proceeding including, but not limited to, the preparation and filing of petitions, schedules, statement of plan of arrangement and negotiating with and obtaining the acceptance of the creditors to the proposed plan of arrangement. The Referee acknowledged the services rendered to the debtor by Petitioner, but nevertheless denied Petitioner allowance of any fee whatsoever (see Opinion of Referee Goldhaber, Appendix A). The United States District Court

for the Eastern District of Pennsylvania, pursuant to Petitioner's Certificate of Review, affirmed the findings of the Referee (see Opinion of the Honorable Thomas J. Clary, Appendix B). Petitioner appealed to the United States Court of Appeals for the Third Circuit which Court, without oral argument, affirmed without opinion (see Judgment Order of the United States Court of Appeals, Appendix C). Petitioner filed a Petition for Argument and Reconsideration; this Petition was also denied (see Appendix C).

REASONS FOR ALLOWING WRIT.

Certiorari should be granted to review the decision of the United States Court of Appeals for the Third Circuit in the instant action because:

1. The opinion of the Referee in Bankruptcy, which was affirmed by the District Court and the Court of Appeals for the Third Circuit, clearly states that Petitioner was denied any compensation whatsoever as counsel for the Debtor, for the sole reason that it defended the uncontested right of the Debtor's President to plead his constitutional privilege against self-incrimination. *The result of this decision is that for the first time in the history of American jurisprudence an attorney has been penalized by a federal court for defending his client's uncontroverted constitutional right to plead his privilege against self-incrimination.* The decisions of the Courts below have deprived Petitioner of property without due process of law in contravention of the Fifth Amendment of the United States Constitution and are so shocking to the conscience and spirit of the Bill of Rights as to require review by this Court.

2. The decision of the Referee in Bankruptcy, as affirmed by the District Court and the Court of Appeals, which allowed a client to plead his privilege against self-incrimination but then penalized the attorney who defended the client's constitutional right to plead that privilege, has produced a severely *chilling effect upon the constitutional rights not to incriminate oneself and to legal counsel,* because that decision discourages attorneys from following their professional obligation to advise a client of and defend his constitutional rights. Review by this Court is necessary to ensure that attorneys will not be discouraged from fully defending their clients' constitutional right against self-incrimination.

3. The decision of the Referee in Bankruptcy, as affirmed by the District Court and the Court of Appeals, which holds that a Debtor's attorney in a Chapter XI proceeding may not be compensated unless the Plan of Arrangement is confirmed, even though the requisite majority of creditors have approved the Plan, is completely unsupported by the language of the Bankruptcy Act, will result in more frequent forced liquidations and involuntary bankruptcies and less frequent use of Chapter XI procedures which Congress intended to encourage. This Court should review the decisions below in order to prevent this incorrect result, and because the decisions present an important issue in the administration of bankruptcy laws which have not heretofore been decided by this Court. *Reading Co. v. Brown*, 391 U. S. 471, 88 S. Ct. 1759, 20 L. Ed. 2d 751 (1968).

A. The Decisions of the Courts Below Which, for the First Time in the History of American Jurisprudence, Penalize an Attorney for Defending His Client's Uncontroverted Constitutional Right to Plead the Privilege Against Self-Incrimination, Deprive the Attorney of Property Without Due Process of Law, and Unconstitutionally "Chill" the Rights Not to Incriminate Oneself and to Legal Counsel.

The right of the Debtor's President not to incriminate himself in the bankruptcy proceeding was never denied by the Referee, since that right was clearly mandated by this Court in *McCarthy v. Arndstein*, 266 U. S. 34, 45 S. Ct. 16, 69 L. Ed. 158 (1924). Yet, after sustaining the exercise of that constitutional privilege, the Referee took the unprecedented step of penalizing the attorney who advised the client and the Court of the client's right to assert that privilege.

In the history of American jurisprudence, no attorney has heretofore been punished for advising a client to plead his Fifth Amendment right against self-incrimination whether or not the privilege relied upon is sustained. To do so would so violate basic principles of the United States Constitution.

The right not to incriminate oneself is a private right of the party pleading it. A witness must assert the privilege personally; his attorney cannot raise it in his behalf. *Haines v. United States,* 188 F. 2d 546 (9th Cir. 1951), cert. den. 342 U. S. 888, reh. den. 342 U. S. 911; *United States v. Willis,* 145 F. Supp. 365 (D. Ga. 1956); *Sears Roebuck & Co. v. American Plumbing & Supply Co.,* 19 F. R. D. 334 (D. Wis. 1956). In the present case, the debtor's president asserted *his* privilege. Petitioner as counsel merely informed the Referee of the legal basis for the assertion of this privilege.

The Referee denied confirmation of the plan of arrangement, which ruling was detrimental to the debtor and to the creditors, the requisite statutory majority of which desired confirmation of the plan. He then denied Petitioner, debtor's counsel, any fee whatsoever. Both of these decisions were based solely upon the decision of the debtor's president to assert his privilege against self-incrimination.

Petitioner was obligated by his duty both to the debtor's president and to the Court to advise the Court of the legal precedents which directed that the Court must sustain the debtor's president's right to plead his privilege against self-incrimination. Canon 7 of the Code of Professional Responsibility begins by stating: "A Lawyer Should Represent a Client Zealously Within the Bounds of the Law." Under that Canon, Ethical Consideration 7-23, Petitioner was also obligated to inform the Court of those precedents even if the witness asserting the privilege was not Petitioner's client.

Since *McCarthy v. Arndstein, supra,* mandated that the debtor's president had the right to assert a privilege against self-incrimination, Petitioner was simply performing his ethical duty by so informing the Referee. When the Referee admitted the validity of this precedent by sustaining the assertion of the privilege, he also necessarily admitted that Petitioner had the duty to inform him of the precedent mandating that sustainment. This Court recently held in *Fuentes v. Shevin,* 407 U. S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972), that the Fourteenth Amendment's protection of property safeguards not only the rights of undisputed ownership, but also has been read broadly to extend protection "to any significant property interest . . . including statutory entitlements." To deny an attorney a fee solely on the grounds that he performed his ethical obligations constitutes a gross deprivation of property without due process of law in violation of the Fifth Amendment to the Constitution. *Fuentes v. Shevin, supra; Schware v. Board of Law Examiners,* 353 U. S. 232, 77 S. Ct. 752, 1 L. Ed. 2d 796 (1957); *Slochower v. Board of Education,* 350 U. S. 551, 76 S. Ct. 637, 100 L. Ed. 692 (1955).

There is an even more fundamental reason why the Referee's decision must be reviewed. If that decision is allowed to stand, it will obviously affect the conduct of every attorney in conscientiously advising a debtor and its officers of their constitutional rights. Every attorney will feel restricted in advising his client to assert the privilege against self-incrimination knowing that such advice will mean both the automatic death of any carefully designed plan and the denial of counsel's rightfully earned fee for putting the plan together. *Such a "chilling effect" on the right of a party to assert a constitutional privilege, we submit, cannot be condoned.*

This Court has reversed decisions and found statutes unconstitutional when they have such a "chilling effect" on

a constitutional right. See NOTE, "The Chilling Effect in Constitutional Law," 69 Columb. L. Rev. 808 (1969), and the multitude of cases cited therein. This Court has clearly stated in several recent opinion *that a witness should suffer no penalty* for his silence in asserting his privilege against self-incrimination. *Malloy v. Hogan*, 378 U. S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964); *Griffin v. California*, 380 U. S. 609, 85 S. Ct. 1429, 14 L. Ed. 2d 106 (1966); *Spevack v. Klein*, 385 U. S. 511, 87 S. Ct. 625, 17 L. Ed. 2d 574 (1966). In *Spevack*, this Court held that an attorney could not be disbarred for asserting his privilege in a judicial inquiry. In his opinion for four members of the Court in *Spevack*, Justice Douglas stated that the holding of *Malloy v. Hogan, supra*, that a witness should suffer *no penalty* for constitutionally permitted silence is "not restricted to fine or imprisonment." It means "the imposition of any sanction which makes the assertion of the Fifth Amendment privilege 'costly'." 385 U. S. at 515.

What a Court cannot do by direct action, it cannot be permitted to do by indirect action. If a Court cannot impose a "cost" upon a witness for asserting his constitutional privilege, certainly it cannot impose a "cost" upon counsel who defends that witness' right to assert that privilege. In practical effect, imposing the cost upon counsel may be even more deleterious than imposing it upon the witness himself.

In several cases this Court has struck down statutes which have a "chilling effect" upon rights secured by the Fifth and Sixth Amendments.

In *United States v. Jackson*, 390 U. S. 570, 80 S. Ct. 1209, 20 L. Ed. 2d 138 (1968) this Court, in an opinion by Justice Stewart struck down a provision in the Federal Kidnapping Act which provided that the death penalty could be imposed if the "jury shall so recommend" but which provided no procedure for imposition of the death

penalty to a defendant who waived the right to jury trial or who pleaded guilty. This Court held that the statute unconstitutionally discouraged a defendant from exercising his Fifth Amendment right not to plead guilty and unconstitutionally deterred the exercise of the Sixth Amendment right to demand jury trial.

In *Strange v. James,* 323 F. Supp. 1230 (D. Kan. 1971) a three judge federal court struck down a State statute which required indigent defendants to reimburse the State for amounts paid by the State to provide counsel or other defense services to the indigent. The three judge court held that the statute had an unconstitutionally "chilling effect" upon the right to counsel and needlessly encouraged indigents to do without counsel which the State was constitutionally required to provide. Although this Court, in an opinion by Justice Powell, *James v. Strange,* 407 U. S. 128, 134, 92 S. Ct. 2027, 32 L. Ed. 2d 600 (1972) affirmed on the grounds that the statute denied equal protection of the laws, this Court would certainly have considered the grounds asserted by the three judge court if the more appropriate grounds of equal protection had not been available.

It cannot be clearer that when a Court tells an attorney that he will be penalized if his client pleads his privilege against self-incrimination, the right to assert that privilege will be "chilled". Since that is exactly what the Referee did in the instant case, that decision should be reversed by this Court.

The Referee based his decision upon his belief that by defending debtor's president's right to plead his privilege against self-incrimination, Petitioner engaged in a conflict of interest and was not rendering service in aid of the administration of the estate. Neither the Referee nor any of the courts below cite a single precedent for this view. Actually it has no foundation whatsoever. Attor-

neys for debtors in bankruptcy have traditionally represented the primary officers and shareholders of the debtor especially in cases involving closely held corporations. Never before has such a relationship been called a conflict of interest. In the present case the Referee, the receiver, the creditors and the debtor all knew of Petitioner's dual representation. No one at any time during the proceedings questioned it or even mentioned it. *No one ever objected.* The first time it was noted was after the proceedings were ended when the Referee decided to base his opinion upon it. Petitioner performed the lion's share of the work in the aborted arrangement; it prepared the plan, submitted it to the Court, negotiated with the creditors and eventually got their approval. The procedure was working out quite smoothly when the debtor's president asserted his privilege against self-incrimination. All parties fully expected that the plan would be confirmed and that the president's assertion of his privilege would not interfere with the expected confirmation (Petitioner believes that the Referee's decision to deny confirmation of the plan was improper, since the Referee had more than ample information from accountants and others. Regrettably, debtor's wishes precluded appeal from the denial of confirmation). Taking these facts into consideration, there was no conflict of interest, since Petitioner was acting in what it believed were the best interests of both clients.

In any event, it was debtor's president (himself an attorney), not Petitioner, who decided to and did assert his *personal privilege.* Petitioner merely defended that right to the Court by citing to the Court uncontroverted precedent mandating that the Court sustain that right. Regardless of whom Petitioner was representing, Petitioner was bound by Ethical Consideration 7-23 of the Code of Professional Responsibility to inform the Court of this decisive precedent.

Petitioner did not request fees for its representation of debtor's president. It requested fees for services traditionally rendered in aid of the administration of the estate, including preparation of the plan of arrangement, negotiation with creditors, the procurement of creditors' agreement to the plan and appearances in Court in support of the plan. The Referee's denial of fees for those services solely on the ground that Petitioner defended the debtor's president's right to plead the privilege against self-incrimination denies Petitioner of property without due process of law and unconstitutionally "chills" the exercise of rights guaranteed by the Fifth and Sixth Amendments of the United States Constitution.

B. The Decision of the Referee in Bankruptcy, as Affirmed by the District Court and the Court of Appeals, Which Holds That a Debtor's Attorney in a Chapter XI Proceeding May Not Be Compensated Unless the Plan of Arrangement Is Confirmed, Even Though the Requisite Majority of Creditors Have Approved the Plan, Is Completely Unsupported by the Language of the Bankruptcy Act, Will Result in More Frequent Forced Liquidations and Involuntary Bankruptcies and Less Frequent Use of Chapter XI Procedures Which Congress Intended to Encourage.

Although the Referee's opinion is primarily based upon his conclusion that in "counselling and representing the Debtor's uncooperative president when he was a witness in proceedings before me", Petitioner "was not rendering service 'in aid of the administration of the estate' ", the Referee, in the final paragraph of his opinion —almost as an afterthought—alternatively held that under Chapter XI, compensation is limited to cases where the

arrangement is confirmed.[1] The Referee cites the lone case of *Robinson, Wolas & Hagen v. Gardner*, 433 F. 2d 1104 (9th Cir. 1970) for this proposition. This holding is of utmost importance to the administration of the bankruptcy laws, because if attorneys are not to be compensated in Chapter XI proceedings unless the plan of arrangement is confirmed, then they will either refuse to accept Chapter XI cases or discourage their clients from employing the procedures which Congress provided in that Chapter.

Furthermore, the *Robinson* opinion is not authority for the proposition asserted by the Referee for three reasons:

(1) The *Robinson* opinion itself specifically states that it is not holding on the issue of debtor's counsel's fees when the arrangement plan has been accepted by the requisite number of creditors;

(2) The *Robinson* opinion, although handed down in 1970, construes the relevant portions of the Bankruptcy Act prior to their being amended in 1967, which amendments deleted the portions of the Act upon which the *Robinson* opinion relied; and

(3) The *Robinson* opinion is an incorrect interpretation of the Act even as it existed before the 1967 amendment.

The *Robinson* Court specifically stated in a footnote at 433 F. 2d 1104, 1106 that it was not deciding the question of whether Section 337(2) of the Bankruptcy Act (11 U.S.C.

1. The discussion herein is directed to the Referee's opinion, because the Court of Appeals issued no opinion and because the District Court's opinion was based upon the wrong section of the Bankruptcy Act. The District Court based its opinion upon Section 339(2) of the Act which applies to the creditor's committee, rather than on Section 337(2) which applies to debtor's counsel.

§737) authorized compensation for services contributing to the acceptance of a plan that was initially accepted but not confirmed. In the *Robinson* case, debtor's counsel expended substantial time seeking to negotiate a plan of arrangement. However, the negotiations failed and the debtor was thereafter adjudicated a bankrupt. The Court held only that debtor's counsel was not entitled to compensation for services rendered in an unsuccessful effort to secure acceptance by the creditors of a plan of arrangement. The Court specifically declined to decide the question of whether the debtor's counsel would have been entitled to compensation if the plan had been accepted. Since in the present case the plan was accepted by the requisite majority of the creditors, the *Robinson* case is no authority for denying debtor's counsel's fees herein.

The *Robinson* opinion is based upon a construction of Section 337(2) as it read before the 1967 amendments to the Bankruptcy Act. Section 337(2) then read:

> "At such meeting, or at any adjournment thereof, the judge or referee shall, after the acceptance of the arrangement . . . (2) fix a time within which the debtor shall deposit, the consideration, if any, to be distributed to the creditors, the money necessary to pay all debts which have priority, unless such priority creditors shall have waived their claims on such deposit or consented in writing to any provision of the arrangement for otherwise dealing with such claims, and the money necessary to pay the costs and expenses of the proceedings and the actual and necessary expenses, including fees and expenses of attorneys, accountants and agents, in such amount as the court may allow, incurred after its appointment by a committee appointed pursuant to Sec. 338 of this Act, or incurred before or after the filing of the petition under this Chapter by a

committee designated in writings, filed with the court signed and acknowledged by a majority in amount of unsecured creditors whose claims have been scheduled otherwise than as contingent, unliquidated or disputed and who would not be disqualified by Sec. 44 of this Act to participate in the appointment of a trustee; *Provided however, that in fixing any such allowances the court shall give consideration only to the services which contributed to the arrangement confirmed* or to the refusal of confirmation of any arrangement, or which were beneficial in the administration of the estate and the proper costs and expenses incident thereto." (Emphasis supplied.) Pub. L. No. 85-732 Sec. 6, 72 Stat. 821 (1958).

The Court's finding was that the "Provided . . . that" clause meant that the Court should only give consideration to services of debtor's counsel which "contributed to the arrangement confirmed." Section 337(2) was amended in 1967 to read:

> "At such meeting, or at any adjournment thereof, the judge or referee shall, after the acceptance of the arrangement—(2) fix a time within which the debtor shall deposit, in such place as shall be designated by and subject to the order of the court, the consideration, if any, to be distributed to the creditors, the money necessary to pay all debts which have priority, unless such priority creditors shall have waived their claims on such deposit, or consented in writing to any provision of the arrangement for otherwise dealing with such claims, and *the money necessary to pay the costs and expenses of the proceeding;* and . . ." (Emphasis supplied.)

As can be seen from the above quotes from Section 337(2) as it existed before and after 1967, the "Provided

. . . that" clause upon which the *Robinson* opinion relied has been entirely deleted from the Act. All references to expenses of the creditor's committee and its agents, attorneys and accountants were also *deleted* from Section 337(2) in 1967.

The rules pertaining to compensation of the *creditor's committee* were placed in a new section, Section 339(2), which was added to the Act in 1967. Section 339(2) does contain a proviso similar to that originally in Section 337(2) and it states that,

> "Expenses of the committee for such assistance, whether incurred before or after the filing of the petition under this Chapter, shall be allowed as an expense of administration to the extent deemed reasonable and necessary by the court, provided the arrangement is confirmed."

Before 1967, Section 337(2) applied to both debtor's counsel fees and creditor's committee fees. It was, therefore, not entirely clear that Congress meant the "Provided . . . that" clause to pertain only to the creditors' committee and that debtor's counsel was to be compensated regardless of whether or not the arrangement was confirmed. In 1967, Congress made its intention clear by placing the proviso only in Section 339(2), the section which applies to the creditors' committee. *Section 337(2) which pertains to debtor's counsel's fees no longer contains this proviso.* Thus Congress made it clear that only the creditors' committee's fees are contingent upon the arrangement being confirmed. Section 337(2) must be the section entitling debtor's counsel to reasonable fees, since there is no other section which could do so, even in the event of a confirmed Plan; and Section 337(2) requires payment of expenses of the proceeding, *without a proviso requiring confirmation.*

The only Court which has decided whether debtor's counsel is entitled to a fee in an unconfirmed Chapter XI proceeding under the Bankruptcy Act as amended in 1967 is the United States District Court for the Southern District of New York. That Court has specifically found that debtor's counsel may be compensated in unconfirmed Chapter XI proceedings. In *In re Casco Fashions, Inc.*, 346 F. Supp. 1252 (S. D. N. Y. 1972), that Court determined that debtor's counsel is entitled to compensation in unsuccessful Chapter XI proceedings. The Court noted that *Robinson* was based upon the Bankruptcy Act prior to the 1967 Amendments and also cast some doubt as to its agreement with *Robinson* even under the former statute. The Court concluded that, "There are good policy reasons for permitting such an award, since the incentive of compensation will certainly stimulate constructive efforts by debtor's counsel to bring about an arrangement beneficial to all concerned." 346 F. Supp. at 1256.

In an unreported case, *In re Styles Express*, No. 62-B-922, the Southern District of New York considered this same issue a year before *Casco*. The lengthy opinion by the Southern District Court's esteemed Referee Asa S. Herzog, which is included in its entirety in Petitioner's Appendix in the Court below (which is part of the record certified to this Court), devotes numerous pages to establishing why that reputable Referee refuses to follow *Robinson*. The Referee summarized his reasons at the outset on page 3 of his opinion stating:

> "I cannot follow *Robinson*. Firstly, it deeply offends my sense of justice and fair play; secondly, I think the decision is wrong and its conclusion reached through tortured reasoning; and finally, the law upon which *Robinson* relies has been changed."

Referee Herzog's decision was affirmed by Judge Bonsal of the District Court for the Southern District of New York in another unreported opinion which is also included in Petitioner's Appendix in the Court below.

As noted by Referee Herzog, the *Robinson* case was an incorrect interpretation of the Bankruptcy Act even as it read prior to the 1967 amendment. The *Robinson* Court read the proviso in the old Section 337(2) as applying to the entire section. Actually the proviso clause only applied to and limited that part of the section which immediately preceded the proviso. As Referee Herzog states on page 7 of his opinion in *Styles Express:*

> "But be this as it may, the entire interpretation [of the *Robinson* case] seems to be in error since the language of Section 337(2), as it formerly read, made it perfectly plain that the proviso applied only to attorneys, accountants and agents of the creditors' committee and not to counsel for a debtor and debtor-in-possession."

It is clear that the prophylactic rule propounded by *Robinson* that a debtor's attorney in a Chapter XI proceeding is not entitled to any compensation unless the plan is confirmed is: 1) not applicable where the plan has been accepted; 2) based upon a construction of Section 337(2) of the Bankruptcy Act as it existed before that section was amended in 1967; and 3) an incorrect interpretation of the Bankruptcy Act even as it existed before the 1967 amendment.

However, the real importance of this petition rests upon the deleterious effects upon the administration of the Bankruptcy laws which the incorrect holding in the *Robinson* case, which was relied upon below, brings about. Referee Herzog again most aptly summarizes the importance of the debtor's attorney to Chapter XI proceedings:

> "*A Chapter XI proceeding revolves about the debtor's attorney.* As the courts have repeatedly remarked, in a Chapter XI case *the attorney for the debtor* and debtor-in-possession *carries the laboring oar. He decides that Chapter XI is the proper remedy to pursue; he initiates the proceeding; he draws all the papers;* he institutes and defends all incidental proceedings which are the normal off-shoots of the arrangement proceeding; he negotiates with creditors, formulates the plan, and moves the case on to and through confirmation. This may take from several months to a year and often longer. *The amount of time consumed is prodigious; the paper work is mountainous; expertise is basic.*" *In re Styles Express, Inc.*, page 4. (Emphasis supplied.)

As a practical matter, without debtor's attorney there would be no Chapter XI proceeding. If attorneys know that their fee for the "prodigious" amount of time required is dependent upon all of the vagaries of getting a plan confirmed, attorneys will be very loath to handle Chapter XI cases. The result will necessarily be a greater number of involuntary bankruptcies and forced liquidations which Congress obviously intended to prevent when it promulgated Chapter XI of the Bankruptcy Act. It is, therefore, extremely important for the administration of the bankruptcy laws that this Court make clear that debtors' attorneys in Chapter XI cases may be compensated in situations where the proposed plan of arrangement fails to be confirmed.

CONCLUSION.

For the reasons stated above, certiorari should be granted.

Respectfully submitted,

MARVIN COMISKY,
MORTON NEWMAN,
ALAN C. GERSHENSON,
Attorneys for Petitioner.

Of Counsel:
BLANK, ROME, KLAUS & COMISKY,
Four Penn Center Plaza,
Philadelphia, Pa. 19103

APPENDIX A.

Opinion and Order of Emil F. Goldhaber, Referee in Bankruptcy.

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

IN BANKRUPTCY.

CAUSE NO. 30377.

IN THE MATTER OF

TIME SALES FINANCE CORPORATION AND ITS WHOLLY OWNED SUBSIDIARY CORPORATIONS, CHATEAU REALTY CORPORATION AND MARPOOLE, INC., *Bankrupts.*

OPINION AND ORDER OF REFEREE IN BANKRUPTCY SUR APPLICATION FOR COUNSEL FEE FOR ATTORNEYS FOR THE DEBTOR.

By EMIL F. GOLDHABER, Referee in Bankruptcy:

On April 5, 1968, the law firm of Blank, Rudenko, Klaus and Rome (now Blank, Rome, Klaus & Comisky), representing Time Sales Finance Corporation ("Time Sales"), filed (on behalf of Time Sales) a Petition for an Arrangement under Chapter XI of the Bankruptcy Act. Subsequently they filed the Debtor's schedules, statement of affairs, and a Plan of Arrangement. Although

the Plan was accepted by the requisite majority of creditors, I refused to confirm the Plan because, inter alia, of the refusal, on constitutional grounds, of the Debtor's president to answer material questions put to him by counsel for the receiver. At the hearing in question, Morton Newman, Esq., of Blank, Rudenko, Klaus & Rome appeared on behalf of the Debtor but, when the Debtor's president was asserting his constitutional privilege, Mr. Newman argued the legal issue on the witness' behalf. I sustained the witness' right to refuse to answer.

The present issue before me arises out of the request of Blank, Rome, Klaus & Comisky, for a $10,000 counsel fee for representing the Debtor. This case having been adjudicated following the aborting of the Chapter XI proceeding, the question is whether the creditors should pay a fee to the counsel for the Debtor, whose legal advice to the president of the Debtor corporation was one of the elements which precipitated the bankruptcy court's refusal to confirm the arrangement. I do not question the propriety of the advice, nor its soundness. But I question whether the estate benefited from this advice, although the Debtor's president may have. In other words, if I award a fee to Debtor's counsel, I would be requiring the creditors to pay the Debtor's counsel, despite the fact that it was Debtor's counsel's advice to the Debtor's president which obstructed the receiver's investigation into the Debtor's affairs.

I think there was a grave question of conflict of interest when counsel for the Debtor, at the first meeting of creditors, not only appeared on behalf of the Debtor, but represented the Debtor's president and interposed objections to questions put to him by counsel for creditors. The effect of the witness' refusal to supply the creditors with information was to frustrate the investigation into the Debtor's assets and its business transactions, and to

make it impossible for the Referee in Bankruptcy to make the finding of fact, required by Section 366 of the Bankruptcy Act, that the arrangement, proposed by the Debtor, was "for the best interest of creditors." Counselled by the attorneys who now seek compensation for their services, the Debtor's president refused to answer any questions regarding the corporation's assets or liabilities.

Back in 1933, the Supreme Court of the United States, in the case of *Conrad, Lubin & Lesser v. Pender,* 289 U. S. 472, 23 AM. B. R. (N. S.) 1, indicated that fees should be paid to counsel for bankrupts only for services "rendered in aid of the administration of the estate and the carrying out of the provisions of the Act." While this characterization was obiter dictum in that case, it must be considered as the most authoritative and exhaustive criterion to be applied when separating those services rendered the bankrupt or debtor for which counsel may claim an allowance, from those which are not compensable out of the bankruptcy estate. In my judgment, the Debtor's attorney, in counselling and representing the Debtor's uncooperative president when he was a witness in the proceedings before me, was not rendering service "in aid of the administration of the estate." To the contrary, counsel's representation of the Debtor's president hindered and impeded the administration of the estate. For this reason I conclude that counsel should receive no compensation from the fund which belongs to the creditors whose inquiries into the Debtor's assets and business transactions were frustrated by counsel's advice to the Debtor's president.

The case of *Robinson, Wolas & Hagen v. Gardner,* 433 F. 2d 1104 (1970), goes even further in denying compensation to counsel to a Debtor. In this case the Referee in Bankruptcy refused to allow a fee to the Debtor's attorneys in an unsuccessful Chapter XI proceeding. On review, the District Court affirmed the Referee, and the

attorneys appealed to the Court of Appeals of the Ninth Circuit. They affirmed, ruling that, under Chapter XI, compensation is limited to *successful* efforts on the part of Debtor's counsel. The Court points out that Congress must have intended compensation to be dependent on the success of the Plan of Arrangement from the fact that there are general compensation provisions in Chapters X and XII, which are omitted from Chapter XI. Hence, concludes the Court, "the natural inference is that Congress intended compensation in Chapter XI proceedings to depend upon the contingency of successful negotiation. It is not the function of this Court to frustrate congressional policy."

On both of the grounds stated above, I deny the application of Debtor's attorneys for a counsel fee.

ORDER.

And Now, to wit, this 26th day of January, 1972, after hearing, the application of Blank, Rome, Klaus & Comisky, Esqs., for compensation as counsel for the Debtor, is Denied.

Emil F. Goldhaber,
Emil F. Goldhaber,
Referee in Bankruptcy.

APPENDIX B.

Opinion and Order of the United States District Court for the Eastern District of Pennsylvania.

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

IN BANKRUPTCY.

CAUSE NO. 30377.

IN THE MATTER OF

TIMES SALES FINANCE CORPORATION AND ITS WHOLLY OWNED SUBSIDIARY CORPORATIONS, CHATEAU REALTY CORPORATION AND MARPOOLE, INC.

MEMORANDUM AND ORDER.

This case comes to the court for review of the Referee in Bankruptcy denying compensation to counsel for the Debtor for services rendered in the aborted Chapter XI Proceeding. The issue of law before this court is "did the Referee, err, as a matter of law, in denying the fees here in question." For reasons stated hereafter this court finds the Referee's ruling to have been proper and affirms the same.

The Debtor initially endeavored to put his finances in order through a Plan of Arrangement, pursuant to the provisions of Title 11 U. S. C. Chapter XI. The Referee having refused to confirm that plan, for reasons wholly irrelevant to the issue under consideration in this review, the Debtor was adjudicated a bankrupt on April 22, 1969. Counsel for Debtor submitted two applications for com-

pensation: (1) a request for allowance of $450.00 as counsel for the Bankrupt, and (2) a request for allowance of $10,000 as counsel for the Debtor in the unsuccessful Chapter XI proceedings. The Referee disallowed the request for counsel fees for the Chapter XI services, stating that there were no provisions in Chapter XI for any payments of that nature, unless, the arrangement was confirmed. The plan for arrangement having failed to be confirmed in this case, the Referee refused to award Counsel for the Debtor the requested fees.

It is a precept long accepted and reaffirmed through the years that a Referee lacks the authority to grant, and the policy of the Bankruptcy Act is against, compensation not expressly provided for by the Act. *Robinson, Wolas & Hagen*, 433 F. 2d 1104 (9th Cir. 1970); *In re Tarifville Manufacturing Company*, 253 F. Supp. 412 (D. Conn. 1965); *Saper v. John Viviane & Son, Inc.*, 258 F. 2d 826 (2d Cir. 1958); *In re: Friedman*, 232 F. 2d 151 (2d Cir.), cert. denied sub nom. *Klein v. Brandt & Brandt Printers, Inc.*, 352 U. S. 835 (1956), *Guerin v. Weil, Gotshal & Manges*, 205 F. 2d (2d Cir. 1953), *Lane v. Haytian Corporation*, 117 F. 2d 216 (2d Cir.), cert. denied, 313 U. S. 580 (19). This rule of law was succinctly restated in *In re Tarifville Manufacturing Company:*

> "It is well settled that the bankruptcy court lacks power to grant, and the policy of the Act is against, compensation not expressly provided for by the Act." Lane v. Haytian Corporation, 2 Cir. 117 F. 2d 216, 219, certiorari denied 313 U. S. 580, 61 S. Ct. 1101, 85 L. Ed. 1537. Although it has been broadly stated that a bankruptcy court is a court of equity, Young v. Higbee Co., 324 U. S. 204, 214, 65 S. Ct. 594, 89 L. Ed. 890, the exercise of its equitable powers must be strictly confined within the prescribed limits of the Bankruptcy Act, *see Berry v. Root*, 5th Cir. 148 F. 2d 945, 946, certiorari

denied 326 U. S. 755, 66 S. Ct. 91, 90 L. Ed. 453. Where Congress intended that allowances should be made it has carefully enumerated them, and any omissions must be construed as express exclusions, 3 Collier, Bankruptcy 1534-7 (14th ed.).

The law being as stated above, the Court directs its attention to Title 11 of the United States Code in search of a provision authorizing the nature of payment herein disputed.

The fees being sought for services rendered under Chapter XI of Title 11, it is to Chapter XI that the Court addresses itself first. In Chapter XI both the Referee and Debtor's Counsel make reference to Section 739 and cite it as being the principle basis for their respective positions. Section 739, in pertinent part, reads:

"(2) A committee elected as provided in section 738 of this title may employ such agents, attorneys, and accountants as may be necessary to assist in the performance of its functions. Expenses of the Committee for such assistance, whether incurred before or after the filing of the petition under this chapter, shall be allowed as an expense of administration to the extent deemed reasonable and necessary by the court, provided the arrangement is confirmed."

The Referee interprets the clause as requiring the plan of arrangement be confirmed in order for the Debtor's attorney to be entitled to compensation. On the other hand, the Petitioner makes an argument, based on semantics and punctuation, that confirmation is required to entitle the *committee* to compensation and expenses, but not the attorneys, accountants or agents whom they hired. While the Court concurs in the Referee's interpretation of the clause it does so on more than its understanding of the phraseology.

Logic clearly calls for the interpretation asserted by the Referee for it would be nonsensical to preclude payment of the incidental expenses of the committee but pay the compensation of the agents, attorneys and accountants—whose bills for service constitute the major expense in such a venture. But far more compelling is the make-up of the Act itself. Within Chapter XI there is no other provision under which counsel may be paid. Clearly, if they were to be paid, they would have to qualify under §739(2). In both Chapter X and Chapter XII, which cover Corporate Reorganization and Real Property Arrangements respectively, there are identical provisions allowing payment of the Debtor's counsel's fees, without any qualifications attached, *i.e.*, Chapter X, Section 641; Chapter XII, Section 891. Finally, as if this were not enough, in 1967 the Congress amended Section 737 of Chapter XI to read as it does today. In doing so, they deleted all reference to payments to counsel and enacted Section 739 to cover the same. If Congress had desired to permit payments of the kind here under fire, clearly, they would have used a clause, of the type found in Chapters X and XII of Title 11. They did not, and from their action the Court feels bound to honor their desire to compensate counsel in Chapter XI situations only if and when the plan of arrangement is confirmed by the Referee.

The cases cited by the defendant are all prior to the enactment of Section 739, the provision under which he claims a right to compensation, and are not persuasive on the general principle that such awards are in order. The law, as previously cited, is otherwise and the Referee's ruling being in keeping therewith, it will and hereby is AFFIRMED.

THOMAS J. CLARY,
Thomas J. Clary,
Senior Judge.

APPENDIX C.

Orders of the United States Court of Appeals.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 72-1539.

IN THE MATTER OF:
TIME SALES FINANCE CORPORATION AND ITS WHOLLY OWNED SUBSIDIARY CORPORATIONS, CHATEAU REALTY CORPORATION AND MARPOOLE, INC.
BLANK, ROME, KLAUS & COMISKY, ESQS.,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Submitted under 3rd Cir. Rule 12(6) April 26, 1973.
Before VAN DUSEN, ALDISERT and ROSENN, *Circuit Judges.*

MARVIN COMISKY, MORTON NEWMAN, AND ALAN GERSHENSON, ESQS.,
BLANK, ROME, KLAUS & COMISKY,
Philadelphia, Pa.
Attorneys for Appellant.

SIDNEY CHAIT, ESQ., ADELMAN & LAVINE,
Philadelphia, Pa.
Attorneys for Raymond R. Walsh, Trustee in Bankruptcy, Appellee.

JUDGMENT ORDER.

After consideration of (I) appellant's contentions that

(a) once a plan of arrangement is accepted by the requisite majority of creditors, the attorney for the debtor is entitled to reasonable attorney's fees for his work in promulgating the plan, and

(b) advising the debtor's president of his constitutional right against self-incrimination cannot be construed as hindering the administration of the estate so as to deny debtor's counsel reasonable fees for services rendered;

(II) the briefs; and (III) the record,

It is ORDERED AND ADJUDGED that the May 2, 1972, order of the district court, affirming the January 26, 1972, order of the referee, is affirmed, with costs to the appellee. See *In The Matter of Time Sales Finance Corporation, et al.*, — F. Supp. — (E. D. Pa. Bankruptcy No. 30377, Opinion of 5/2/72).

BY THE COURT:
VAN DUSEN,
Circuit Judge.

ATTEST:
THOMAS F. QUINN,
Clerk.

Dated: April 27, 1973

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT.

No. 72-1539.

IN THE MATTER OF:

TIME SALES FINANCE CORPORATION AND ITS WHOLLY OWNED SUBSIDIARY CORPORATIONS, CHATEAU REALTY CORPORATION AND MARPOOLE, INC.

BLANK, ROME, KLAUS & COMISKY, ESQS.,
Appellant.

SUR PETITION FOR REHEARING.

Present: SEITZ, *Chief Judge*, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER and WEIS, *Circuit Judges.*

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,
FRANCIS L. VAN DUSEN,
Judge.

Dated: May 16, 1973.